BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of The Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147

COMMENTS OF TIME WARNER TELECOM

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Time Warner Communications Holdings Inc. d/b/a Time Warner Telecom ("TWTC"), by its attorneys, hereby files its comments in response to the Notice of Proposed Rulemaking in the above-captioned proceeding.[1]

I. INTRODUCTION AND SUMMARY

In this proceeding, the FCC has sought comment on whether incumbent LECs should be permitted to provide advanced services on an unregulated basis through separate affiliates ("706 affiliates"). The Commission has also sought comment on ways of reducing existing regulatory barriers to the provision of advanced services by new entrants. The fundamental issue raised by these proposals is whether they are more likely to promote or harm competition for advanced services than continued regulation

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[1] See Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, *Memorandum Opinion and Order, and Notice of Proposed Rulemaking* (rel. Aug. 7, 1998) ("Notice").

of advanced services as incumbent LEC offerings under Section 251(c).

Before the FCC reaches the policy issues raised by its 706 affiliate proposal, however, it must address the fact that the 706 affiliates, as proposed, likely constitute "successors" to the incumbents. If this is the case, the FCC does not have the authority under Section 251(h) to relieve the affiliates of incumbent LEC regulation.

But it is also clear that competition in advanced services is much less likely to develop if the FCC deregulates the incumbent LECs' advanced services than if it continues to regulate them. First, as Dr. Leland Johnson explains in a declaration submitted along with these comments, the proposed 706 affiliate safeguards are inadequate to prevent incumbents from discriminating in favor of their advanced services affiliates. Of course, discrimination is also likely to occur where the incumbent provides advanced services on a regulated basis. But the harm to competition caused by such discrimination will be greater where the incumbent can provide advanced services on an unregulated basis. This threat arises because discrimination will prevent competitors from providing service in some areas, thus making resale of the 706 affiliate's retail offering the only source of competition. Yet, if the 706 affiliate need not offer its service at a wholesale discount to competitors, even resale competition will be precluded

Second, as Dr. Johnson explains, current rate regulation of incumbents does not eliminate the incentive to cross-subsidize

unregulated services. Thus, deregulating the incumbents' advanced services offerings creates the incentive to cross-subsidize those offerings where full regulation of those offerings would not.

Third, deregulating advanced services offerings gives the incumbents the incentive to move essential facilities to the 706 affiliate. This outcome arises because the 706 affiliate would not be required to provide those facilities on an unbundled basis. To prevent the transfer of essential facilities, the Commission and possibly state commissions must engage in potentially difficult monitoring functions.

Finally, contrary to the apparent rationale behind the Notice, the 706 affiliate proposal will only serve to reduce the incumbents' incentive to provide advanced services. Incumbents are currently investing heavily to provide those services. They are doing so largely in response to emerging competition in the provision of advanced services. For the reasons explained above, however, that competition is less likely to flourish if the 706 affiliate proposal is adopted than if the incumbents' high-speed services are regulated under Section 251(c).

In contrast to the advanced services affiliate proposal, the Commission's proposals to reduce the barriers to entry in the advanced services market promise to advance the goals of Section 706. The Commission should pay special attention to removing the entry barriers created by its collocation regime. Specifically, the Commission should ensure that (1) collocation is priced based on forward-looking cost; (2) incumbents provision collocation in

accordance with established national standards (with states free to establish additional standards) and (3) available central office space is used as efficiently as possible.

II. THE FCC PROBABLY LACKS THE AUTHORITY TO IMPLEMENT ITS 706 AFFILIATE PROPOSAL.

The FCC may not forbear from applying Section 251(c) to a firm that qualifies as an incumbent LEC.[2] Section 251(h)(1)(B)(ii) states that a local carrier is considered an incumbent if it is a "successor or assign" of an incumbent. The FCC's 706 affiliate would likely qualify under the law as a successor to the incumbent in instances in which the FCC proposes to forbear from regulating the 706 affiliate as an incumbent LEC. Thus, the FCC appears to lack the authority to implement its 706 affiliate proposal.

In the Notice, the FCC states that,

> if a BOC transfers to an affiliated entity ownership of any network elements that must be provided on an unbundled basis pursuant to Section 251(c)(3), such an entity would be deemed to be an assign of the BOC under section 3(4) of the Act with respect to those network elements.[3]

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[2] See 47 U.S.C. § 160(d) ("the Commission may not forbear from applying the requirements of section 251(c) or 271 . . . until it determines that those requirements have been fully implemented"); Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, *Memorandum Opinion and Order*, ¶¶ 69-79 (rel. Aug. 7, 1998) (rejecting incumbent LEC requests for forbearance from 251(c) regulation of advanced services offerings and finding, in any case, no evidence to support the conclusion that 251(c) has not been fully implemented).

[3] Notice at ¶ 105.

The scenario described would properly result in the 706 affiliate being deemed an assign of the BOC. However, the scenario cannot be deemed to constitute the sole and complete manner by which an advanced services affiliate is deemed a successor or assign of the BOC. Transfers of equipment that would not be considered unbundled elements as well as arrangements in which the incumbent and the 706 affiliate share certain resources would also likely cause the 706 affiliate to be classified as a successor and therefore subject to regulation as an ILEC.

In determining whether a firm is a successor, "[t]he critical inquiry is whether there is a substantial continuity of identity between the two organizations."[4] Although this test arose under an interpretation of the National Labor Relations Act, it has been adopted and used in other contexts.[5] Moreover, the D.C. Circuit has explained that "[i]n the non-labor contractual cases, 'successor' has often been defined as 'one who takes the place that another has left and sustains the like part or character.'"[6] Indeed, the Seventh Circuit took notice of and followed a state case involving a situation analogous to the ILEC/advanced services affiliate relationship:

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4 New York v. Operation Rescue National, 80 F.3d 64, 70 (2d Cir. 1996)(citing John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 551 (1964)), cert. denied sub nom., Broderick v. U.S., 117 S.Ct. 85 (1996).

5 See id.; see also Additive Controls & Measurement Systems, Inc. v. Flowdata, Inc., 1998 Lexis 21414, 47 U.S.P.Q.2d 1906 (Fed. Cir. (Tex.) 1998).

6 Safer v. Perper, 569 F.2d 87, 95 (D.C. Cir. 1977)(quoting Wawak Co. v. Kaiser, 90 F.2d 694, 697 (7th Cir. 1937)).

> where a company conveyed the property relating to one line of its business and discontinued the line, it was held, that the good will of the discontinued line passed to the purchaser, although it was not mentioned.[7]

Hence, a continuity of identity or sustenance of like character from a parent organization to an affiliate is sufficient to qualify as legal successorship. The FCC's UNE transfer proposal for determining successorship is therefore legally insufficient. It fails to comprehend a variety of arrangements that would qualify as legal successorship. For example, an advanced services affiliate using the BOC's name to provide high-speed services that will gradually replace traditional circuit-switched service would appear to qualify as a successor in that it would operate as the continuation of identity or sustenance of like character. In addition, joint marketing and sharing marketing employees (both of which are apparently permissible under the 706 affiliate proposal) would result in the affiliate appearing to share an identity or to sustain a like character with the BOC. These arrangements are permissible under the FCC's UNE transfer proposal. Consequently, that proposal would permit a course of action that would be prohibited by the courts and would be vulnerable on appeal.

III. THE COMMISSION'S PROPOSED REGULATORY RELIEF FOR INCUMBENT LEC PROVISION OF ADVANCED SERVICES WOULD HARM COMPETITION.

In the Notice, the Commission has proposed to allow incumbent LECs to provide advanced services on a deregulated

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[7] Wawak, 90 F.2d at 698.

basis via a "truly" separate subsidiary (subject to requirements similar to those applicable to BOC interLATA Section 272 affiliates). The Commission states, however, that "to be free of incumbent LEC regulation, an advanced services affiliate must function just like any other competitive LEC and not derive unfair advantages from the incumbent LEC."[8] As explained below, however, the proposed 706 affiliate would derive unfair advantages from the incumbent. As a result, the proposed affiliate must be considered a dominant carrier. Deregulating the offerings of such a dominant carrier will be much more harmful to advanced services competition than continued application of the Section 251(c) requirements.

A. Incumbent LECs Would Have The Incentive And Opportunity To Discriminate In Favor Of Their Advanced Services Affiliates.

The FCC has long recognized that the establishment of a separate subsidiary in no way diminishes the incentives of incumbent LECs to discriminate against downstream rivals and to cross-subsidize service offerings not subject to regulation. As the FCC observed in the Computer II proceeding,

> [a] separate subsidiary requirement, from a purely structural perspective, does not guarantee a competitive marketplace because it does not significantly change the incentives of a firm upon which it is imposed. . . . Thus, in general, if the parent has an incentive to exercise its market power to the disadvantage of consumers and competitors in the

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[8] See Notice at ¶ 87.

absence of a separate subsidiary, is has the same incentive to do so after one is required.[9]

Separate subsidiaries are designed to reduce a dominant firm's opportunity to discriminate and cross-subsidize. Dr. Johnson explains in his declaration, however, that an ILEC intent upon discriminating in favor of its affiliate and cross-subsidizing unregulated advanced services will be able to do so, notwithstanding the safeguards proposed by the Commission.[10]

First, Dr. Johnson explains his concerns regarding ILEC discrimination in favor of advanced affiliates. The Commission relies principally upon three tools to prevent potential discrimination: (1) Section 251(c)(2)'s requirement that ILECs be required to provide requesting carriers with interconnection of superior or lesser quality than the ILEC currently provides (to the extent technically feasible); (2) the Act's preexisting rules designed to prevent discrimination; and (3) state rules prohibiting anticompetitive behavior.[11] Dr. Johnson concludes that these regulatory tools will be extremely difficult to enforce against an ILEC intent upon favoring its affiliate.[12]

Dr. Johnson's declaration includes four hypothetical scenarios which demonstrate an ILEC's ability to achieve

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9 See Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), *Final Decision*, 77 FCC 2d 384, ¶ 204 (1980).

10 See Declaration of Leland L. Johnson, Ph.D. at 2-3 (Sept. 18, 1998) (attached as Appendix A) ("Johnson Dec.").

11 See id. at 5-6.

12 See id. at 6.

technical compliance with the Commission's proposed Section 706 separate subsidiary criteria, while at the same time disadvantaging in subtle ways carriers competing with the ILEC's 706 affiliate.[13] In addition, the ILEC will be able, despite the appearance of an "arms length" relationship with its affiliate, to understand and compare the business strategies of its affiliate and its affiliate's competitors. The ILEC may gather information through: (1) contracts it enters with its affiliate and its affiliate's competitors; (2) sharing of services with the 706 affiliate; and (3) intermixing of employees between it and its affiliate.[14] The opportunity to discriminate combined with detailed information regarding competitive high-speed data offerings places ILECs in a very strong position indeed to give their advanced services affiliates an unfair advantage over the competition.

Moreover, as Dr. Johnson points out, the dynamic emergence and evolution of advanced services will increase the opportunities for discrimination.[15] This point is critical to this proceeding. The instability of the technical arrangements for the provision of high-speed networks distinguishes the instant situation from the circuit-switched services for which the Section 272 rules were essentially designed. The equal access protections against discrimination in the circuit switched

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13 See id. at 6-7.

14 See id. at 8-10.

15 See id. at 8.

context have been in place for many years. Moreover, in the case of the BOCs, the equal access rules were established at a time when the incumbents did not have the right to provide competitive long distance services. Thus, the BOCs did not have the incentive to resist implementation of the equal access protections. In the case of advanced services, however, the Commission would be faced with implementing non-discrimination safeguards in a highly fluid environment in which the incumbents' affiliates provide service in competition with other advanced services affiliates.[16]

Furthermore, Section 272 safeguards were intended by Congress to apply, with the exception of certain "incidental" offerings, to services that BOCs may provide only after they have met the requirements of Section 271. In most cases, this means that local competition will have developed, and the BOC's incentive to discriminate will be reduced before the BOC can provide service via the 272 affiliate. In contrast, the FCC proposes in the Notice to permit incumbents to provide advanced

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16 The FCC's Open Network Architecture rules, designed to prevent BOCs and GTE from discriminating against unaffiliated enhanced service providers, failed largely because the FCC attempted to establish those rules where the incumbents themselves provided enhanced services and therefore had every incentive to prevent effective non-discrimination rules from being established. See Affidavit of Marius Schwartz on Behalf of the U.S. Department of Justice, ¶¶ 145-148 submitted with Evaluation of the Department of Justice in Second Application by BellSouth Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region InterLATA Services to Louisiana, CC Docket No. 98-121 (describing reasons for failure of FCC ONA regime).

services via the unregulated 706 affiliate regardless of whether the requirements of Section 271 (including Section 251) have been met. For this reason as well, the Section 272 safeguards cannot simply be assumed to be appropriate in the instant context.

In sum, discrimination will likely occur regardless of whether the incumbent provides advanced services through a separate affiliate. But the consequences of discrimination could be much worse if the incumbents are permitted to provide advanced services through an unregulated affiliate. This would be the case if the discrimination results in the affiliate's retail offering itself becoming an essential facility.

For example, assume that competitors are able to provide service in parts of a geographic market but are prevented from doing so in certain other parts of the same market because of discriminatory treatment in the provision of collocation space.[17] The 706 affiliate, however, is able to provide advanced services throughout the market. In such a situation, the only way the 706 affiliate will face competition in the areas where competitors have been denied collocation is through resale of the affiliate's

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[17] Such selective discrimination in collocation is apparently already occurring. See Nick Wingfield, "No Mercy, Covad Communications needs the Bells' cooperation to thrive. It says it isn't getting much" Wall S.J. Sept. 21, 1998, R10 (reporting that "Covad executives say [Pacific Bell], citing space constraints, has denied it access to 35 central offices throughout the region - about 25% of the 138 Pacific Bell facilities in which Covad has sought to install its equipment. But in four of the central offices where its applications for space were rejected, Covad executives say, Pacific Bell managed to find space for its own DSL equipment -- and has begun hawking high-speed services to customers").

end user service. But if the 706 affiliate is not subject to the resale requirements by virtue of its unregulated status, there will be no competition at all in select areas. Were the incumbent's advanced services subject to full incumbent LEC regulation, competitors could at least offer service on a resale basis (albeit a less desirable form of competition than facilities-based competition).

B. Incumbent LECs Would Have The Incentive And Opportunity To Cross-Subsidize The Affiliates' Offerings.

In addition to likely discrimination, Dr. Johnson examines the potential for ILEC cross-subsidy of services it shares with its affiliate notwithstanding the Commission's price cap regime and accounting rules. The Commission's price cap regime includes three problematic features. Productivity growth must be based on a sufficiently broad-based industry average such that a particular ILEC cannot affect the X-factor through its own behavior.[18] Dr. Johnson concludes that the Commission will face difficulty maintaining this condition of independence. In addition, to the extent ILECs coordinate their activities either via a holding company or via merger, the Commission's task in this regard is that much more difficult.[19] State rate regulation in many cases also gives the incumbents the incentive to cross-subsidize their unregulated offerings with regulated offerings.[20]

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18 See Johnson Dec. at 10-11.

19 See id. at 11-12.

20 See id. at 12.

Dr. Johnson also demonstrates that the Commission's rules for allocating costs between regulated and unregulated accounts do not prevent cross-subsidy. The declaration includes two tables: one which demonstrates the Commission's two-tiered approach to the allocation of costs between regulated and non-regulated activities -- direct assignment, followed by indirect assignment based upon relative usage; another which performs the same calculations based upon an economic attribution of costs. Relying on a hypothetical, Dr. Johnson finds that the two models will not always generate the same results.[21] In sum, he concludes that "relative usage provides an unreliable basis for tracing cost causation."[22]

It is important to emphasize that the incentive to cross-subsidize is much greater where advanced services are unregulated than when they are regulated. Where a carrier provides a service for which it is not rate-regulated, it has the incentive to shift costs to the regulated side. In this way, the carrier can evade regulation intended to prevent it from charging profit maximizing rates. The carrier does this by charging customers for the competitive service and also by raising regulated rates to recover the costs recorded in the regulated rate base. Where the prices for both services are regulated, the same incentive does not exist. Thus, by deregulating advanced services, the Commission would increase the incumbents' incentive to act

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21 See id. at 15.

22 See id. at 16 (emphasis in original).

inefficiently.[23] This, by itself, is not a reason to avoid deregulating any incumbent services. But when taken together with the other problems caused by the 706 affiliate proposal, it is a reason to continue regulating advanced services.

C. The Deregulation Of The Incumbent LECs' Advanced Services Requires That The Commission Identify Those Facilities That Are Essential To Competitive Providers Of High-Speed Data Services.

As explained above, it is likely that the 706 affiliate proposal would result in much greater harm to competition due to discrimination and cross-subsidy than would be the case if ILEC advanced services were fully regulated under Section 251(c). But there are other problems with the proposal. As the Commission acknowledges, deregulating advanced services would require the Commission to monitor the facilities transferred by the parent to the affiliate. The problem is that if the affiliate owns a facility that its competitors need in order to compete, the deregulated affiliate would not be under an obligation to provide the facility to its competitors as an unbundled element.

In determining which facilities must continue to be classified as unbundled elements, the Commission must focus on the level of fixed costs required for providing advanced services

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[23] Even where price caps work as designed, they create further problems. For example, price caps reduce a regulated firm's incentive to invest in upgrading the facilities used to provide services subject to the caps. State regulators try to ensure that the quality of regulated local services is not in fact degraded. The more services that an incumbent provides on a deregulated basis, however, the more difficult it may be for the states to ensure that an adequate proportion of an incumbent's revenues are reinvested in the regulated plant.

to a given set of customers. If the fixed costs of providing high-speed services are high enough, the Commission should ensure that the facilities in question are available as unbundled elements. In this way, competitors will be able to take advantage of incumbent LEC economies of scale that would otherwise be available only to the incumbent's affiliate.

This line-drawing exercise could turn out to be increasingly difficult as the technology for providing advanced services develops. As discussed, the highly unstable nature of the technical arrangements at issue make all forms of regulatory oversight much more difficult. It could prove quite difficult for the Commission to determine whether a particular piece of equipment will be needed by competitors or whether those competitors can simply purchase their own substitutes. For this reason, TWTC opposes any transfer of facilities from the incumbent to the 706 affiliate without close regulatory review. A de minimus rule would offer too much opportunity for abuse. This is true even if de minimus transfers are permitted for only a short period of time, as suggested in the Notice.[24] As explained in the next section, the incumbents are already aggressively investing in advanced services. Thus, there is probably already a great deal of equipment (much of which is essential to competitors) that the ILECs have deployed and that they would try to transfer to an unregulated affiliate.

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[24] See Notice at ¶ 109.

D. The 706 Affiliate Proposal Would Ultimately Diminish The Incumbents' Incentive To Provide Advanced Services.

The 706 affiliate proposal is apparently the FCC's response to claims by incumbents that they have little incentive to invest in advanced services if those services are regulated under Section 251(c). But this assertion is simply false. The incumbents are investing aggressively in advanced service capabilities. They are doing so in response to emerging competition for these services. As explained above, if the FCC were to implement its 706 affiliate proposal, it would harm advanced services competition. The 706 affiliate proposal therefore promises ultimately to diminish the incumbents' incentive to provide advanced services.

An abundance of evidence demonstrates that the incumbents are now aggressively investing in advanced services capabilities. For example, according to Bell Atlantic CEO Ivan Seidenberg, data network build-out is Bell Atlantic's "highest strategic priority,"[25] and the company has stated that it will proceed with building a high-speed data network backbone whether or not existing regulatory restrictions are lifted.[26] Bell Atlantic is

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25 *Manufacturers Display Voice-Data Systems for High-Speed Networks*, COMMUNICATIONS DAILY, June 10, 1998 (BA has 2,500 SONET rings, 4.4 million miles of new fiber, and ATM switches in major markets.). Mark Meudt, vice president of marketing at ADSL equipment manufacturer Westell Technologies asserts that Bell Atlantic will offer ADSL to 2 million subscribers in 1998 and an additional 5 million in 1999. *Cable Modem Deployment Seen Surpassing ADSL Installations by 2003*, COMMUNICATIONS TODAY, July 29, 1998.

26 *Telecoms: FCC Considers RBOC Entry into InterLATA*, NETWORK BRIEFING, July 21, 1998; see also *Telecoms: Bell Atlantic*

"accelerating the construction of [its] high speed data network in 1998"[27] and has spent $600 million this year alone on new networks and the deployment of asynchronous transfer mode (ATM) architecture in 13 states.[28] The company expects to spend up to $1.5 billion over the next five years to create its "next generation broadband data network"[29] and has announced that it will install seven million ADSL lines throughout its operating regions.[30] Bell Atlantic announced in February that it was currently conducting ADSL trials in Boston, Northern Virginia, Pittsburgh, and Ithaca, NY with plans to launch commercial offerings to consumers in 1998.[31] Indeed, the CEO of Bell Atlantic Data Systems Group, Joe Farina, asserts that "the

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Petitions FCC Over Data Networks Restrictions, NETWORK BRIEFING, Jan. 28, 1998.

27 *Ciena Takes Stock Beating, Anticipates New Shipments*, COMMUNICATIONS TODAY, March 9, 1998.

28 *Manufacturers Display Voice-Data Systems for High-Speed Networks*, COMMUNICATIONS DAILY, June 10, 1998. The State of Maine is a beneficiary of such efforts and, as a result of Bell Atlantic's enormous network infrastructure investment in that State, now has one of the most technologically advanced telecommunications systems developed to date. See proactive@ba.com/nr/1998/Aug/199808170.

29 *Network Upgrade: Bell Atlantic Steps up Deployment of High-Speed, Broadband Data Network*, EDGE, April 6, 1998. Lawrence T. Babbio, president and CEO, Network Group and chairman, Global Wireless Group, Bell Atlantic states that it is "dedicating even more resources to the new applications" and that its "aggressive investment in this powerful, leading-edge technology will differentiate us from the competition, attract new customers and convince those who've tried the competition that we're the best choice." Id.

30 *Telecoms: Bell Atlantic Lays out $500M Data Network Plans*, NETWORK BRIEFING, June 9, 1998.

company has analyzed the economics of building an ATM network and found them 'very favorable.'"[32]

Ameritech has also committed to a sizable advanced telecommunications investment. It has upgraded systems in 5 states, invested over $200 million, and plans to eventually install packet-switched technology in each of its central office switches.[33] Ameritech has already launched ADSL service offerings in Michigan[34] and plans ADSL deployment to reach 70% of its customer base within three years.[35]

US West has invested more than $200 million in an urban high-speed Internet and data network[36] and boasts "the most aggressive roll-out of xDSL of any carrier in the country."[37]

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31 http://www.ba.com/policy/positions/1998/Feb/adsl.html.

32 Id.

33 *Manufacturers Display Voice-Data Systems for High-Speed Networks*, COMMUNICATIONS DAILY, June 10, 1998. CEO Richard Notebaert says that Ameritech has installed 1,000 SONET rings in its service area, including 153 packet data switches based on ATM and frame relay technologies. By mid-1998, Ameritech is expected to have 9 additional ATM switches. Id.

34 http://www.ba.com/policy/positions/1998/Feb/adsl.html.

35 Joan Engebretson & Vince Vittore, *More RHCs Seek Relief on Data: Ameritech and BellSouth Plan New Data Services*, TELEPHONY, February 23, 1998 ("It's well ahead of our forecasts, and we were pretty aggressive with those," said Patrick Campbell, executive vice president of corporate strategy and business development at Ameritech.); http://www.ameritech.com/products/data/adsl/index.html

36 *Administration Proposal Says "no" to Rural Americans Getting Access to High-Speed Internet and Data Services, Says US West*, PR NEWSWIRE, July 27, 1998

37 Petition of U S West Communications, Inc. for Relief from Barriers to Deployment of Advanced Telecommunications at 7.

Its new ADSL integrated Internet and voice system was anticipated to reach more than five million customers in 43 cities in US West's 14-state territory by the end of July 1998.[38] The company has partnered with numerous national computer companies, including Microsoft and Hewlett-Packard, to distribute software over the high-speed network.[39] US West has also received franchises in three Arizona cities to provide digital multichannel video and on-line services over telephone lines utilizing VDSL technology in competition with cable operators.[40]

BellSouth asserts that it "has been a leader in making advanced services available to consumers within its LATA boundaries, as well as deploying advanced communications capabilities throughout its networks."[41] BellSouth VP William Smith states that the company "has been working 'aggressively' to get DSL technologies to market" and plans to make ADSL services

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38 § 706 NOI Comments of US West at 8 (to date, the company has deployed ADSL in 215 of these wire centers); see also *ADSL: US West to Launch Second 20-City Wave of Lightning-Fast ADSL Internet Service*, EDGE June 8, 1998. US West president and CEO Sol Trujillo states that "[a] lot of companies promise big changes with new technology some time in the distant future. We're offering this service right now - - not just to a few high-end users, but to homes and offices across the region." Id. See also *US West Brings Lightening-Fast Internet Access to Homes in 40 Cities by June 1998*, PR NEWSWIRE, January 29, 1998; Peter Burrows, Ron Grover, *US West Scouts a New Frontier*, BUSINESS WEEK, May 18, 1998; http://www.uswest.com/com/insideusw/news/060598.html.

39 *News Digest: PowerTV/Spyglass Prepare to Ax the Competition*, INTERACTIVE HOME, March 1, 1998

40 § 706 NOI Comments of US West at 9.

41 § 706 NOI Comments of BellSouth at 13.

available to 1.6 million homes in its service area in 1998 with that number increasing to five million customers in 30 markets by the end of 1999.[42] BellSouth conducted an ADSL market trial in Birmingham, Alabama in 1997, and has now initiated commercial ADSL services in New Orleans.[43] The company plans to deploy the service in Birmingham, Atlanta, Charlotte, Raleigh, Jacksonville, and Fort Lauderdale by the end of the month.[44] BellSouth anticipates commercial deployment in an additional 20 metropolitan markets in its 9-state region in 1999.[45]

SBC Communications launched an ADSL service in a limited number of cities in 1997 and anticipates a broader launch this year.[46] The company plans to spend approximately $600 million over the next three years to upgrade to a high-speed digital network.[47] Its subsidiary, Pacific Bell, announced that it will deploy ADSL service in at least 200 cities in California beginning in July, 1998.[48]

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42 *Telecom Industry Sees $2 Billion Investment to Install High-Speed Services*, COMMUNICATIONS DAILY, March 19, 1998(a "LEC can install DSL on 70% of its loops without too much problem."); *AT&T/TCI Merger Puts Pressure on Cable, Telco's Video Plans*, VIDEO TECHNOLOGY NEWS, July 13, 1998.

43 § 706 NOI Comments of BellSouth at 14.

44 Id.

45 Id.

46 SBC Communications, Inc. 1997 Annual Report 12 (1998)

47 Marina Bidoli, Duncan McLeod, *Consolidation Accelerates*, FINANCIAL MAIL, July 3, 1998.

48 "SBC Communications Announces Broad ADSL Deployment Across California," Press Release (May 27, 1998) <http://www.sbc.com/News/Article.

In April 1998, GTE announced that its regulated LEC, GTE Network Services, would roll out xDSL/ADSL service to 300 central offices in 16 states beginning in June, 1998.[49] GTE asserts that it has embarked on "one of the industry's largest deployments of high-speed ADSL Internet-access technology" in order to accelerate that company's overall growth.[50]

While the incumbents are thus aggressively investing in advanced services, more competition in the provision of these services will only increase the urgency they feel to provide these services. As explained, competition is less likely to flourish if the incumbents can provide service through the proposed deregulated 706 affiliate.

IV. THE COMMISSION MUST REMOVE ENTRY BARRIERS CREATED BY ITS CURRENT COLLOCATION RULES.

The focus of the instant proceeding should be on ensuring that competitive providers of advanced services are able to obtain access to incumbent LEC facilities on reasonable rates,

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49 *GTE Decides Time is Right for Large-Scale ADSL Roll Out*, ISDN NEWS, April 21, 1998; see also http://www.gte.com/g/news/980427/html; *Extended Range for GSM Demonstrated*, *FINANCIAL TIMES*, June 10, 1998; *GTE to Move ADSL Services from Trials to Commercial Reality*, BROADBAND NETWORKING NEWS, April 28, 1998. John Appel, President of GTE Network Services asserts that data networking is a market that GTE "expects to grow to $400 billion in the next 10 years" and that "[h]igh speed bandwidth in the local loop is one of the keys to achieving this market potential." Id.

50 *Data Network Costs Offset Revenue Growth at GTE*, COMMUNICATIONS TODAY, July 21, 1998. "The company's spending on data services shaved profits by 11 cents a share, but produced revenue of $191 million, up from $11 million a year ago." Id. See also Philip Sanders, *New Products and Services: Extended-Range GSM Demonstrated*, FINANCIAL TIMES, June 10, 1998.

terms and conditions. TWTC commends the Commission for exploring in some detail the manner in which to achieve this goal. Among the issues raised in the Notice, there are three aspects of collocation that deserve special attention: (1) bringing rates closer to cost; (2) improving incumbent LEC provisioning performance, and (3) ensuring more efficient use of available central office space.

First, the FCC should ensure that all interstate rates for virtual as well as physical collocation are based on forward-looking cost.[51] There is no policy difference between rates set for unbundled elements and interconnection, which the FCC has found should be based on forward-looking cost, and collocation. Collocation, like UNEs and interconnection, is an essential input of production for competitive service offerings. The rates for such inputs should only recover costs that an efficient provider would incur in providing them.

In addition, incumbent LECs should be required to allow competitive LECs to purchase equipment used in virtual collocation arrangements (for which incumbent LECs have already been fully compensated) for $1 or a similar nominal sum so that

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[51] The Commission has required incumbents to compute collocation rates on a cost-causative basis, but it has not specified that such rates on forward-looking. See, e.g., Local Exchange Carriers' Rates, Terms and Conditions for Expanded Interconnection Through Physical Collocation for Special Access and Switched Transport, CC Dkt. No. 93-162, *Second Report and Order* at ¶ 20 (rel. June 13, 1997); Expanded Interconnection with Local Telephone Company Facilities, *Memorandum Opinion and Order*, 9 FCC Rcd 5154, ¶¶ 121-137 (1994).

the superior physical collocation arrangements can be established in place of current virtual collocation arrangements.[52] Prior to the passage of the 1996 Act, TWTC and other competitive LECs were forced to rely on virtual collocation.[53] However, virtual collocation is a poor substitute for physical collocation even under the best of terms. CLECs need to be able to place their own equipment in their own space, accessible to their own technicians and under their own control. These are reasonable and legitimate operational considerations based on TWTCs practical experience with both forms of collocation.

Since passage of the Act, incumbent LECs must now offer physical collocation under Section 251(c)(6). To convert from virtual to physical collocation, a physical collocation arrangement must be established with new transmission equipment, and then circuits operating on the virtual arrangement must be "cutover" to the new physical arrangement. Unless the equipment utilized in the virtual arrangement again, equipment already

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52 While the existing TWTC collocated equipment is used to provide circuit switched services, the manner in which those collocation arrangements are converted does significantly affect TWTC's ability to offer advanced services. Where it is possible for TWTC to move circuit-switched equipment to physical collocation, that equipment can share the collocation space with high-speed data equipment. Where such sharing is possible, the cost of collocation for both services is lower.

53 See Expanded Interconnection with Local Telephone Company Facilities, *Memorandum Opinion and Order*, 9 FCC Rcd 5154, (establishing mandatory virtual collocation regime following D.C. Circuit decision in Bell Atlantic Tel. Cos. v. FCC, 24 F.3d 1441 (D.C. Cir. 1994) (overturning the FCC's physical collocation rules).